06-70884

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL ANGELO MORALES, Petitioner-Appellant, v. **STEVEN ORNOSKI, Acting Warden of California State Prison at San Quentin,** Respondent-Appellee.	**DEATH PENALTY CASE**

OPPOSITION TO APPLICATION TO FILE SECOND OR SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS AND TO REQUEST FOR STAY OF EXECUTION

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INTRODUCTION

Early in the evening of January 9, 1981, in accordance with their plan to commit murder, Michael Morales ("petitioner"), and his cousin Rick Ortega, lured 17-year-old Terri Lynn Winchell into Ortega's car in Stockton, California and drove to a remote vineyard area near Lodi, California. Petitioner brought several weapons into the car -- a belt, a hammer, and a knife. He sat in the back seat, behind Terri Winchell. After giving Ortega a pre-arranged signal that announced the imminent attack, Petitioner took out the belt, slipped it over Terri Winchell's head, and began to strangle her. Terri Winchell struggled, screaming for help, and

the belt broke. Petitioner then took out his second weapon, a claw hammer, and hit Terri Winchell in the head at least twenty-three times, until she finally lost consciousness. Petitioner then took her body out of the car, dragged her across the road and into a vineyard. Petitioner raped Terri Winchell before she died, and then stabbed her in the chest four times with a knife.

This Court can be absolutely certain that these facts are true. This is so principally because the facts come from petitioner himself. In an effort to save himself from a death sentence, Petitioner confessed to these facts to his jury at the time of trial twenty-three years ago, and yet again just three weeks ago in his petition for clemency, addressed to the Governor of California. The jury heard that petitioner acknowledged that "he put the belt around her neck, and when it broke, he took the hammer out and he began hitting her on the back of the head with the hammer."[1/] (SER[2/] at 17.) The jury heard that petitioner hit Winchell so many times "because she wasn't dying[,]" and that she screamed out, "'What are you doing?'" (SER at 17.) When he finally finished beating Terri Winchell into

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1. In petitioner's recent clemency application, he made similar admissions, detailing how he had put the belt around Terri Winchell's neck and hit her in the head with the hammer. Petitioner, however, feigned having no recollection of the rape and stabbing, directly and incredibly contradicting his confession at trial.

2. Pursuant to Ninth Circuit Rule 22-3, the warden presents Supplemental Excerpts of Record, and will refer to them as "SER."

unconsciousness, he "said he took her out of the car and that he then took her into the vineyard." (SER at 18.) After ordering Ortega to leave, petitioner admitted that "he had sex" with Terri Winchell. (SER at 3057.) After raping her, he got up and began to walk away. The jury then heard that he decided to finish his horrifying assault by walking back, and stabbing Winchell four times in the chest, to make "sure she was dead." (SER at 16.)

For twenty-three years, including all during his fifteen-year sojourn in the federal courts, and even in this last-minute application, petitioner has ***never once*** disputed the truth of his admissions to the jury. These admissions alone nullify petitioner's desperate assertion that he has dispositive new claims or compelling new material evidence that warrant further consideration by this Court. Every aspect of the case against petitioner, and every essential aspect of the capital conviction and sentence has been definitively proven by petitioner's own words, alone, thereby confirming to this Court that petitioner stands before it deserving of the ultimate sanction.

But it is important to bear in mind that petitioner was not sentenced to death on the basis of his detailed admissions alone. He was convicted and sentenced to death because, in addition to his admissions, this Court has already found that "[t]he state's testimonial and physical evidence implicating Morales

was overwhelming. There was no conflicting evidence regarding whether Morales murdered Terri Winchell, why he murdered her, or how he murdered her." *Morales v. Woodford*, 388 F.3d 1159, 1172 (9th Cir. 2004). And if that were not enough, after careful consideration of the entire record in this case, this Court has found that petitioner committed "an entirely gratuitous and terribly vicious murder." *Id.*

There are no new claims in this application. Instead, petitioner is content to recycle two *Brady*[3/] claims and a *Massiah*[4/] claim involving a jailhouse informant. All of these claims should be rejected as successive on their face. To the extent that there is any conceivable argument that any claim is new, the underlying evidence for it has either previously been considered by this Court, or should have been previously presented with the exercise of due diligence. Most crucially, though, nothing in the application establishes petitioner's innocence of any capital offense, and nothing suggests that he does not deserve the capital penalty so long delayed. Petitioner's application to file a second or successive petition and his request for a stay of execution should therefore be denied.

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3. *Brady v. Maryland*, 373 U.S. 83 (1963).

4. *Massiah v. United States,* 377 U.S. 201 (1964).

PROCEDURAL HISTORY

On April 7, 1983, following a change of venue from San Joaquin County, a Ventura County jury convicted petitioner of special circumstance murder by torture and lying-in-wait, conspiracy to commit murder, and rape. On April 25, 1983, the same jury returned a verdict of death, and the superior court entered a death judgment.

The California Supreme Court affirmed petitioner's conviction and death sentence on April 6, 1989. *See People v. Morales,* 48 Cal. 3d 527 (1989). Petitioner then filed a petition for writ of certiorari with the United States Supreme Court, which was denied. *See Morales v. California*, 493 U.S. 984 (1989). Petitioner subsequently filed two habeas corpus petitions in 1992 and 1993 in the California Supreme Court (case numbers S030276 and S032386), which were denied.

Petitioner next filed a habeas corpus petition in the United States District Court for the Central District of California (case number CV 91-0682-DT). That court rejected all of petitioner's claims, entered judgment against petitioner on April 21, 1999, and denied petitioner's motion to alter or amend the judgment on June 14, 1999.

Thereafter, petitioner appealed to this Court, which affirmed the rejection of petitioner's claims. *Morales v. Woodford*, 388 F.3d 1159. This Court also denied a petition for rehearing and suggestion for rehearing en banc. Petitioner subsequently filed a petition for writ of certiorari with the United States Supreme Court, which was denied on October 11, 2005. *See Morales v. Brown*, ___ U.S. ___, 126 S. Ct. 420 (2005).

On January 18, 2006, the Ventura County Superior Court signed the death warrant for petitioner and set his execution date for February 21, 2006.

On January 27, 2006, petitioner filed a clemency petition with the Governor of the State of California. On February 6, 2006, the San Joaquin District Attorney filed his opposition to the clemency petition. On February 7, 2006, petitioner filed his reply. On February 10, 2006, the San Joaquin District Attorney presented supplemental materials to the Governor. On February 17, 2006, the Governor denied clemency.

On February 10, 2006, petitioner filed his third habeas petition with the California Supreme Court (case number S141074). The People filed their informal response on February 13, 2006, and petitioner filed his informal reply on February 14, 2006. On February 15, 2006, the California Supreme Court denied all the claims raised in the petition both on the merits and as untimely.

Now, four days before his scheduled execution date, petitioner has filed this belated application.

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ARGUMENT

I.

PETITIONER FAILS TO MEET THE STANDARD NECESSARY TO OBTAIN PERMISSION TO FILE A SECOND OR SUCCESSIVE PETITION

A. Law Governing Applications To File Second Or Successive Habeas Petitions

A state prisoner seeking authorization to file a second or successive habeas petition must satisfy the strict limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). A second or successive petition must be denied, unless:

> (B)(i) the factual predicate for the claim could not have been previously discovered through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proved and reviewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> 3(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the

appropriate court of appeals for an order authorizing the district court to consider the application.

. . .

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

28 U.S.C. § 2244(b)(2); *see Jackson v. Roe*, 425 F.3d 654, 660 (9th Cir. 2005) (AEDPA imposes "strict limitations" on successive petitions).

The Supreme Court has explained that § 2244(b)(3) "creates a 'gatekeeping' mechanism for the consideration of second or successive applications in district court. The prospective applicant must file in the court of appeals a motion for leave to file a second or successive habeas application in the district court." *Felker v. Turpin*, 518 U.S. 651, 657 (1996); *see also Nevius v. McDaniel*, 104 F.3d 1120, 1121 (9th Cir. 1996). Thus, under the gatekeeper provisions, a district court may not accept for filing a second or successive petition unless the applicant first successfully moves in the court of appeals for an authorizing order by demonstrating that the requirements of § 2244(b) are

satisfied. *See generally Greenawalt v. Stewart*, 105 F.3d 1287, 1287-88 (9th Cir. 1997); *Gerlaugh v. Stewart*, 35 F. Supp. 2d 1163, 1164-65 (D. Ariz. 1999).

In the gatekeeper application, § 2244(b)(3)(C) requires petitioner to make a "prima facie showing that this additional evidence, viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [Petitioner] guilty." *Thompson v. Calderon*, 151 F.3d 918, 924-25 (9th Cir. 1998). This requires Petitioner to submit to the court of appeals documents which reasonably satisfy the stringent requirements for the filing of a second or successive petition. *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997); *accord Cooper v. Woodford*, 358 F.3d 1117, 1119-20 (9th Cir. 2004). Specifically, as the United States Supreme Court has explained:

> [t]he relevant provisions of the AEDPA-amended habeas statutes, 28 U.S.C. §§ 2244(b)(1) - (3), impose three requirements on second or successive habeas petitions: First, any claim that has already been adjudicated in a previous petition must be dismissed. § 2244(b)(1). Second, any claim that has not already been adjudicated must be dismissed unless it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual

innocence. § 2244(b)(2). Third, before the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet § 2244(b)(2)'s new-rule or actual-innocence provisions. § 2244(b)(3).

Gonzalez v. Crosby, 125 S. Ct. 2641, 2646 (2005).

Here, petitioner filed a habeas petition with the United States District Court in 1991, amended in 1993, seeking relief from the same judgment and sentence at issue here. All of the claims in the petition were denied and the judgment was entered on April 21, 1999. Petitioner's application to file a second and successive federal habeas petition wholly fails to satisfy, and indeed cannot satisfy, the "extremely stringent" gatekeeping requirements of § 2244(b)(3). Thus, his request must be denied. *Babbitt v. Woodford*, 177 F.3d 744, 745 (9th Cir. 1999).

B. Petitioner's Claims Do Not Meet The Requirements Of § 2244(b)

1. Petitioner's Claim One -- That The Prosecution Violated *Brady v. Maryland* -- Was Previously Raised And Rejected, And Otherwise Fails To Satisfies The Requirements Of § 2244(b)

In Claim One, petitioner alleges that a jailhouse informant named Bruce Samuelson testified falsely at his trial. In particular, petitioner alleges that the

prosecutor knew that Samuelson's testimony was false, that the prosecutor failed to disclose that knowledge, and that the prosecutor elicited the false testimony at trial, and failed to correct it. (SOS Petn. at 21-26, *see also* 21 at ¶4.) These are claims of violations of the rule of *Brady v. Maryland*, 373 U.S. 83, and these very claims were previously raised in the first habeas corpus petition filed in federal court.

The claim that the prosecution had knowingly used perjured testimony was presented as Claim 4 of the first amended petition for writ of habeas corpus (SER at 40-53), and the claim that the prosecutor had failed to disclose and correct Samuelson's testimony as to the true terms of his plea agreement, was previously presented as Claim 5 of the first amended petition. (SER at 53-64.) These claims were rejected by the district court on the merits. (SER at 160-65.) These claims were raised again in a motion to alter or amend the judgment. The district court found them untimely and denied them on the merits. (SER at 177-78, 229-35.)

On appeal, this Court denied petitioner a certificate of appealability on these claims, and then denied petitioner rehearing, and rehearing en banc on the knowing-use-of-perjury claim. Petitioner then sought certiorari review of the knowing-use claim in the United States Supreme Court, and that Court denied certiorari.

Petitioner does very little to alter or improve these claims in their new guise. Indeed, he presents exactly the same evidence in support of the claims as he offered in his first petition, with only minor exceptions. These exceptions consist of allegations and declarations of the informant's former trial counsel, the judge who presided over the informant's plea agreement, the attendant probation officer, and others familiar with the informant's criminal history, and finally the opinion of the trial judge at petitioner's own trial concerning how he might have ruled on a motion to modify the death sentence under California law had he been presented with the allegations regarding the informant at the time of sentencing. Petitioner's additional evidence does nothing to change the gravamen of the underlying claim that the prosecutor knowingly used perjured testimony.

It is readily apparent that claim one of the proposed successive petition represents nothing more than a combination of Claims 4 and 5 from petitioner's prior habeas petition. Combining two claims into one does not make a new claim. As this Court explained in *Babbitt v. Woodford*, 177 F.3d at 746, when "the basic thrust or gravamen of the legal claim is the same" the claim is considered successive even though it is supported by "different factual allegations." *Id.* Here, the basic thrust of the claim is that the prosecution suppressed material favorable evidence. *See United States v. Steinberg*, 99 F.3d 1486, 1489-90 (9th

Cir. 1996). This is the same argument that Petitioner previously made in this Court and every other court that has examined Petitioner's trial. Accordingly, because petitioner's claim that the prosecution violated *Brady v. Maryland*, 373 U.S. 83, was previously presented and rejected, attempting to resurrect it with purportedly new facts is insufficient. Petitioner has not met the "stringent" requirements of the gatekeeping statute as to Claim One, and his request to file a second or successive petition must be denied. 28 U.S.C. § 2244(b)(1).

Petitioner nonetheless appears to argue that his *Brady* claim is new because he only recently discovered that the trial judge was of the opinion that this claim warranted relief. (SOS Appl. at 8-9.) Judge McGrath's opinion, at the very best, reflects new evidence to support his claim, but it does not change the underlying claim itself. More to the point, petitioner, by his own admission, has known for twelve years of the core allegation upon which his knowing-use claim has been predicated, the allegation that petitioner could not have confessed to the informant because petitioner does not speak Spanish. Petitioner could have gone to Judge McGrath over twelve years ago to seek his opinion of how he might have otherwise ruled in light of this information.[5/] Indeed, all of the allegations in

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5. The Attorney General's Office was never contacted by Judge McGrath prior to the writing of his letter to the Governor. The Attorney General did not participate in any discussions that opposing counsel or his investigators may have had that with Judge McGrath prior to the signing of the letter, and the Attorney

support of claim one that have not previously been presented could have been presented in connection with the first habeas petition. Petitioner has not remotely shown diligence in developing and presenting either his claim or its supporting evidence.

If this were not enough, petitioner cannot begin to put forward any colorable claim that he is actually innocent because of his admissions to the jury that he had, in fact, committed lying-in-wait murder. But there is much more. Petitioner admitted murdering Terri Winchell not only to Bruce Samuelson, but also to petitioner's girlfriend, Raquel Cardenas, and to his housemate, Patricia Flores (now Felix). On the day of the murder, petitioner told Cardenas that he was going to strangle a girl with a belt. (SER at 2-3.) When he returned home

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General does not know what materials were submitted to Judge McGrath as a result of any such discussions. Nonetheless, one thing is certain. Judge McGrath's view of the evidence and the importance of Bruce Samuelson's testimony has drastically changed from the time of trial. At trial, at the time he denied petitioner's motion to modify the death sentence, Judge McGrath, contrary to his recent letter, found "that the evidence concerning the truth of the special circumstance is overwhelming and the jury's assessment of the evidence that aggravation outweighs mitigation as to the selection of the proper penalty to be death is supported overwhelmingly by the weight of the evidence." (SER at 19.) Additionally, Judge McGrath stated: "my personal assessment is that the factors in aggravation beyond a reasonable doubt outweigh those in mitigation." (SER at 23.) While not required under California law or the Constitution, Judge McGrath's findings of overwhelming evidentiary support for the jury's conviction and sentence, and personal finding of aggravation beyond a reasonable doubt demonstrate conclusively that at the time of trial, Judge McGrath did not find that Bruce Samuelson's testimony was the linchpin to the death penalty in this case.

following commission of the crimes, petitioner placed Terri Winchell's purse on the table and dumped the contents. He then threw a belt at Cardenas and told her it broke. Cardenas testified that it appeared that petitioner had blood on his hands. (SER at 4-5.) Cardenas went outside to look in the car petitioner and his cousin had used, and saw blood on the door. (SER at 6.) Petitioner then told Cardenas just how he had murdered Terri Winchell. He said that he had tried to strangle her with a belt from behind, but the belt broke. He told Cardenas that he then beat Terri in the head with a hammer until she lost consciousness. Terri screamed for Ortega to make petitioner stop. Petitioner then dragged her body from the car. (SER at 8-10.)

Patricia Flores testified that, on the day of the murder, when petitioner left their home, she noticed her hammer and a kitchen knife were missing. Petitioner and Ortega were gone for about an hour, and when they returned, petitioner was holding a broken belt. (SER at 11.) Petitioner went outside, and Flores followed. She, too, saw that there was blood in the car. Petitioner later confessed to Flores that he used the belt in an attempt to strangle someone, but the belt broke. He also told Flores that he then used a hammer to hit his victim in the head. Petitioner told Flores that after he beat his victim, he dragged her body out of the car, "fucked her," and then stabbed her. (SER at 12.)

The day before petitioner murdered Terri Winchell, petitioner literally "practiced" committing the quintessential example of lying-in-wait murder on his housemate, Patricia Flores. While Flores was sitting in her kitchen, petitioner snuck up on her from behind, caught her unawares, and put his belt over her head and around her neck to practice the strangling he would later commit. (SER at 13-14.) This moment in Flores's life stays with her to this very day. As she recounts in her sworn and tape-recorded account given just twelve days ago to two law enforcement investigators:

> I will never forget. I was sitting in the kitchen at the table and he came up from behind me and he put a thin belt around my neck and he said he was practicing.

(SER at 244.)

This is exactly the same method petitioner used to catch Terri Winchell unawares the next day when petitioner began his brutal and vicious surprise attack on her in Rick Ortega's car.

It is also undisputed that when searching petitioner's residence after the crimes, police located a broken belt underneath petitioner's mattress, and that they recovered a hammer that had been placed in the vegetable crisper in the refrigerator. It is also undisputed that her skull was beaten until it was crushed in

several places, and it exhibited at least twenty-three identifiable wounds; that she was raped; and that she was stabbed in the chest four times. Petitioner's suggestion that no evidence apart from Samuelson's testimony established the elements of first-degree murder and the lying-in-wait special circumstance is ludicrous. The testimony of Cardenas and Flores, along with the indisputable physical and forensic evidence, provided the jury with all the brutal details necessary to warrant the first degree murder conviction and special circumstance finding. Petitioner was not convicted of capital murder and sentenced to death because of Samuelson. He was convicted and sentenced on the basis of the other "overwhelming" evidence, including his own graphic, pitiless and gruesome admissions to Flores, Cardenas, and to the jury itself.

2. Claim Two Of The Proposed Successive Petition -- That The Prosecutor Committed Misconduct By Failing To Disclose Evidence That Could Have Been Used To Impeach Samuelson, And By Knowingly Allowing Samuelson To Present False Testimony -- Was Raised And Rejected And Otherwise Fails To Satisfy The Requirements Of § 2244(b)

In his second claim for relief -- just as he did in his amended petition thirteen years ago -- petitioner argues that his trial was unfair because the prosecutor failed to disclose evidence that could have been used to impeach Bruce Samuelson, and because the prosecutor knowingly allowed Samuelson to testify

falsely at trial. (SOS Appl. at 17-19; SOS Petn. at 26-34.) This claim is identical to claims raised in the amended petition in 1993, which were ultimately rejected on their merits by the district court in 1998. The same claims were rejected on appeal by this Court. Because petitioner does not remotely satisfy even the first requirement of section 2244(b)(1) -- that the claim presented actually be "new," never before having been raised and rejected in an earlier petition -- the application must be rejected.

In Claims 4 and 5 of the 1993 amended petition, petitioner argued that his constitutional rights were violated by the prosecution's failure to disclose material evidence related to Samuelson (Claim 4), and by the prosecution's knowing use of perjured testimony, again with respect to Samuelson (Claim 5). (SER at 40-64.) Petitioner now combines these stale claims to make a "new" one, alleging a constitutional violation based on "multiple acts" of prosecutorial misconduct. (SOS Petn. at 26-34.) Claim 4 alleged that Samuelson's plea agreement with the prosecution was the evidence not disclosed to the defense (SER at 40-53), and Claim 5 alleged that Samuelson -- with the prosecutor's knowledge -- testified falsely about his plea agreement and how Petitioner had confessed to committing the crimes (SER at 53-64).

In Claim Two of the SOS Petition, just as he did in his original amended petition, Petitioner focuses on Samuelson as the destructive force at trial, alleging that the "prosecutor intentionally breached his affirmative duties to disclose material exculpatory evidence," and that the "prosecutor knowingly elicited false and perjurious testimony about the contours of his agreement with the prosecutor and the nature of the benefits provided to him in exchange for his testimony." (SOS Petn. at 26-27.) These are the identical claims previously raised and rejected by the district court. With respect to the claim that the prosecution failed to disclose evidence that could have been used to impeach Samuelson, the district court ruled:

> In assessing the materiality of the allegedly suppressed impeachment evidence, the question is whether it is reasonably likely that the jury would have concluded that there was reasonable doubt that Morales was guilty of murdering Terri Winchell, if the jury had known that in addition to the promise of a recommendation for a one-year jail sentence, Samuelson expected that in exchange for his testimony, four pending felony charges would be dropped and his probation reinstated. At trial, Samuelson was extensively cross-examined by petitioner's counsel, who brought out his criminal history and his motives for offering testimony

against Morales. The jury was aware that Samuelson was a career criminal who faced serious criminal charges and who had been promised lenient treatment in exchange for testifying against Morales. The jury knew that Samuelson faced little jail time, if he testified as the prosecution expected. In view of what the jury knew, the allegedly suppressed information concerning the number of felony charges and the reinstatement of probation could have had no effect on the assessment of Samuelson's credibility, and hence no effect on the outcome of the trial. There was thus no suppression of material exculpatory evidence.

(SER at 162-63.)

In rejecting the aspect of Claim Two of the SOS Petition alleging that the prosecution knowingly permitted Samuelson to lie while testifying, the district court ruled:

The evidence adduced by petitioner is insufficient to support an inference that the prosecutor knowingly presented false testimony... The evidence concerning newspaper reports, viewed in the light most favorable to petitioner, would only establish opportunity, not actual fabrication. Moreover, these evidentiary items do nothing to show that the prosecutor knew that Samuelson's testimony was false. Petitioner's claim, therefore,

> rests entirely on speculation about notes contained in the district attorney's file for Bruce Samuelson's car theft and forgery case. This evidence, viewed against the record of Garber's subsequent request that Samuelson undergo a polygraph examination, is simply insufficient, "for the petition is expected to state facts that point to 'a real possibility of constitutional error.'" *O'Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir. 1990) (quoting *Blackledge v. Alllison*, 431 U.S. 63, 75, fn.7 (1977)).

(SER at 164-65.)

Petitioner does not even pretend that these are new claims. He simply reasserts them. As § 2244(b)(1) explains, "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." This claim has been presented before. It must be dismissed.

In any event, even if the claim was not simply a transparent reiteration of claims asserted in the original amended petition, petitioner fails to satisfy the remaining requirements of section 2244(b). Specifically, petitioner was obligated to show that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence. . . ." 28 U.S.C. § 2244(b)(2)(B)(i). Petitioner relies on no new facts here. Instead, every piece of

information he relies upon was available at the time of trial. *See* SOS Petn. at 27-34 (relying on aspects of the plea agreement, a 1994 polygraph report, a pre-plea probation report, Samuelson's criminal history, and parts of Samuelson's 1993 interview). In fact, almost all of this information was used to support these claims the first time they were raised in federal court, thirteen years ago.

Finally, despite the obvious deficiencies with respect to this intended "new" claim, Petitioner could never satisfy the requirement that the facts offered to support it are "sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the application guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii). According to Petitioner, absent the alleged errors, the jury would have been unable to find the lying-in-wait special circumstance allegation to be true. (SOS Appl. at 17.) This contention is patently false. It simply ignores the evidence of guilt for the murder and special circumstance of lying in wait that this Court has previously and accurately described as simply "overwhelming." *Morales v. Woodford*, 388 F.3d

at 1172.[6] Petitioner has failed to satisfy any of the requirements of § 2244(b). His application to file a second or successive petition should be denied.

3. Claim Three Of The Proposed Successive Petition -- That Petitioner's Constitutional Rights Were Violated Because Samuelson Was An Unlawful Police Agent -- Was Raised And Rejected And Otherwise Fails To Satisfy The Requirements Of § 2244(b)

Petitioner next claims that his constitutional rights were violated because Samuelson was acting as an unlawful police agent, within the meaning of *United States v. Massiah*, 377 U.S. 201 (1964). (SOS Appl. at 19-20; SOS Petn. at 35-37.) Just as was the case with respect to Claim Two of the SOS Application and Petition, this exact claim was previously raised in, and rejected by, the district court when the 1993 amended petition was denied. Because this claim was presented previously, the request to raise it a second time must be denied. 28 U.S.C. § 2244(b)(1).

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6. In refusing to grant a Certificate of Appealability as to these claims when one was sought by Petitioner on appeal, this Court necessarily determined that the claims failed to demonstrate "a substantial showing of the denial of a constitutional right," within the meaning of 28 U.S.C. § 2253(c). A claim that failed to meet that standard cannot possibly qualify as the type of constitutional error, under § 2244(b), that would have prevented the jury from finding petitioner guilty of capital murder.

In his 1993 amended petition, Claim 6 raised this precise *Massiah* claim. (SER at 64-67.) Petitioner now relies on essentially the same facts and arguments he relied upon before. (*Compare* SER at 64-67 *with* SOS Petn. at 35-37.) In rejecting this claim, the district court ruled:

> The evidence proffered by Morales in support of this claim is entirely speculative, and fails to establish that the prosecutor deliberately placed Samuelson in an adjacent cell in order to obtain incriminating statements from Morales. *Cf. Harris v. Vasquez*, 913 F.2d 606, 629 (9th Cir. 1990) (petitioner failed to present a "sufficient evidentiary basis to require a hearing on whether [the informant] was a government agent."). Respondent is therefore entitled to summary judgment on this claim.

(SER at 164-65.)

This Court agreed with the district court's assessment, in affirming that ruling on appeal. As this Court aptly held,

> Morales presents no evidence to demonstrate that the state planted Samuelson near him to get him to talk outside the presence of his attorney. On this record, the district court did not abuse its discretion in denying an evidentiary hearing on whether the state planted Samuelson. That Samuelson bargained with what he had -- information -- for what he

wanted -- lenience -- does not support an inference that he was planted to get such information.

Morales v. Woodford, 388 F.3d at 1180.

It is beyond debate that Claim Three of the SOS Petition is identical to Claim 6 of the 1993 amended petition. It is beyond debate that this claim has already been rejected by the district court and this Court as well. Accordingly, pursuant to the mandate of § 2244(b)(1), the SOS Application must be denied.

In any event, petitioner offers no new facts in support of this recycled claim, and instead relies on the identical evidence cited in the prior habeas petition. Moreover, the error alleged, even if established by "clear and convincing" evidence, is hardly the type that would have inspired the jury to find petitioner "not guilty" of capital murder. Again, this Court -- in considering and rejecting this claim on appeal -- correctly pointed to the utterly "overwhelming" evidence of petitioner's guilt. The powerful observation made by this Court bears repeating:

> There was no conflicting evidence regarding whether Morales murdered Terri Winchell, why he murdered her, or how he murdered her. And it was an entirely gratuitous and terribly vicious murder.

Morales v. Woodford, 388 F.3d at 1172.

Petitioner has failed to meet the requirements of § 2244(b). Accordingly, his application to file a second or successive petition must be denied.

4. Petitioner Has Failed To Allege A Prima Facie Substantive Claim Of Actual Innocence Because The Factual Predicate Of His Claim Has Been Known To Him For Many Years, And Petitioner Has Manifestly Failed To Show That No Reasonable Fact Finder Would Have Found Lying-In-Wait In Light Of His Asserted "New" Evidence

Petitioner alleges that he is "innocent of capital murder." (SOS App. at 20-21; SOS Petn. at 37-41.) Petitioner's reliance on this assertion of innocence is two-fold. First, petitioner seeks to bring a claim of factual innocence of the lying-in-wait special circumstance in a successive habeas petition. Second, petitioner relies on the same assertions to try to meet the stringent requirements for filing second or successive applications under § 2244(b). Petitioner's proffer does not even remotely allege a prima facie claim for relief (assuming a free-standing claim of innocence is cognizable), or approach the showing required by § 2244(b). Accordingly, as demonstrated below, petitioner's application fails.

Indeed, to the extent that petitioner seeks to raise a freestanding claim of factual innocence of the lying-in-wait special circumstance, his attempt to do so should be rejected simply because he has not even alleged that he did not, in fact, lie in wait -- an absolute requirement for a freestanding claim of actual, factual innocence. Second, to the extent that petitioner seeks to meet the stringent

requirements of § 2244(b) by relying on an assertion of innocence, his assertion falls far short of the mark because petitioner has been aware of the factual predicate of his claim for many years. Specifically, to the extent that petitioner once again relies on his allegation that Bruce Samuelson provided false testimony at his trial, the allegation is not the least bit new. In fact, petitioner has been arguing this claim and these facts for thirteen years. Similarly, to the extent that petitioner contends that he is innocent of capital murder because of drug use, those facts have been known to him since the time of the murder itself, and have been known to current counsel for petitioner since at least 1994. Accordingly, petitioner cannot meet even the first requirement of § 2244(b). Most fundamentally, petitioner has utterly failed to show that, absent Bruce Samuelson's testimony, no reasonable factfinder would have found true the special circumstance that petitioner murdered Terri Winchell by lying-in-wait, or that, in light of the evidence of petitioner's alleged drug-induced state, no reasonable fact-finder would have found that petitioner murdered Terri Winchell by lying-in-wait.

a. Petitioner Has Failed To Allege A Prima Facie Substantive Claim Of Actual Innocence Of Lying-In-Wait Because He Does Not Claim That He Did Not, In Fact, Lie In Wait

The Supreme Court has never held that a freestanding claim of actual innocence of either guilt or the death penalty is cognizable in a federal habeas proceeding. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("Claims of actual innocence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.") Thus, to the extent that petitioner's application seeks to raise in a successive petition a claim that has never been recognized, the application should be denied. Nevertheless, even assuming such a claim would be cognizable, petitioner's application fails for the reasons discussed below.

Petitioner does not proffer a claim that he is actually innocent of murdering Terri Winchell. Rather, petitioner alleges that he is actually innocent of the lying-in-wait special circumstance. *See Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992) (discussing actual innocence of the death penalty as cause for procedural default). However, petitioner's claim is fatally flawed in that he fails to claim -- and indeed he cannot now legitimately claim -- that he did not, in fact, lie in wait. Because a substantive claim of actual innocence of lying-in-wait must

be based on the premise that the petitioner did not, in fact, lie in wait, petitioner's claim fails on its face.

The Supreme Court has marked a clear distinction between procedural claims of actual innocence (to overcome procedural obstacles to the consideration of other claims of constitutional error) and substantive claims of actual innocence, which the Court has equated with factual innocence. *See Sawyer v. Whitley*, 505 U.S. at 339 (emphasizing difference between "*actual* as compared to *legal* innocense") (emphasis added), citing *Smith v. Murray*, 477 U.S. 527, 537 (1986). The Court has also explained that "'[d]emonstrating that an error is by its nature of the kind of error that might have affected the accuracy of a death sentence is *far from demonstrating* that an individual defendant is probably "actually innocent" of the [death] sentence he or she received.'" *Id.* at 340 (emphasis added), quoting *Dugger v. Adams*, 489 U.S. 401, 412 n.6 (1989). Similarly, the Supreme Court in *Bousley v. United States*, 523 U.S. 614 (1988), explained that "[i]t is important to note . . . that 'actual innocence' means *factual* innocence, not mere legal innocence." *Id.* at 623 (emphasis added).

In *Herrera v. Collins*, 506 U.S. at 404, 417-19, the Court assumed the right to assert a claim of factual innocence, noting that a petitioner seeking to raise such a claim faced an "extraordinarily high" burden. In her concurring opinion,

Justice O'Connor wrote that "the execution of a legally *and factually* innocent person would be a constitutionally intolerable event." *Id.* at 419 (emphasis added).

In *Schlup v. Delo*, 513 U.S. 298 (1995), the Supreme Court held that a petitioner claiming actual innocence solely as a procedural gateway need not meet the factual innocence standard. Rather, he only needed to show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt in light of the new evidence. *Id.* at 325-29. However, the Court emphasized the difference between claims of actual innocence to satisfy a procedural gateway and freestanding claims of factual innocence. *Id.* at 860 ("In *Herrera*, the petitioner advanced his claim of innocence to support a novel constitutional claim, namely that the execution of an innocent person would violate the Eighth Amendment. . . . Schlup's claim of innocence, on the other hand, is procedural, rather than substantive."). The Court later explained that the *Schlup* standard would *not* be applied to the "fundamentally different" freestanding claims of actual innocence (assuming the cognizability of such a claim). *Id.* at 328 n.47. Rather, those claims would be governed by a standard of "factual innocence." *Id.*

As a district court in this Circuit has aptly explained:

> [A] substantive claim of actual innocence is subject to the standard of review set forth in *Herrera*, and not the more lenient standard employed when the claim of actual innocence is a procedural claim, which operates as a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits."

Jackson v. Calderon, 1997 WL 855516, *6 (C.D. Cal. 1997) (quoting *Schlup v. Delo*, 513 U.S. 298). Of particular importance here is the district court's further observation that a claim of factual innocence involves a claim that "the defendant was not the individual who committed the [special circumstance]" whereas legal innocence would include a claim that "the defendant did not possess the requisite mental state such that he should [not] be found guilty of the [special circumstance]." *Id.* at 66.

The foregoing authorities lead to the inescapable conclusion that petitioner's substantive freestanding claim of actual innocence of lying-in-wait requires a showing that petitioner in fact did not commit the act of lying-in-wait. Petitioner's claim fails on its face as he has not even alleged that he did not lie in wait. Rather, he focuses entirely on his legal responsibility or "legal innocence."

Accordingly, his application to present this fatally defective claim in a successive petition must be denied.

b. Even Assuming Petitioner Has Alleged A Cognizable Claim, He Cannot Show That He Was Not Previously Aware Of The Factual Predicate Of His Claim, Or That The Factual Predicate Could Not Have Been Previously Discovered Through The Exercise Of Due Diligence, As Required By § 2244(b)

As previously set forth, a petitioner asserting actual innocence as a procedural gateway must proffer evidence that was not previously discoverable. Moreover, it is the evidence itself and not its legal significance that must be newly discovered. *Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2001). Accordingly, petitioner may not rely on evidence of which he was previously aware in support of his argument that he meets the requirements of § 2244(b). *Babbitt v. Woodford*, 177 F.3d at 747. Rather, petitioner must demonstrate that he could not have previously discovered the factual predicate on which his proffered new claim is based, notwithstanding his exercise of due diligence in attempting to do so. *Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 405 (2001); *Calderon v. Thompson*, 523 U.S. 538, 558 (1998) ("factual predicate for claim must 'not have been discoverable previously through the exercise of due diligence'") (bracket omitted).

Furthermore, to show that such a claim is "credible[,]" petitioner must support his proffered claim with "new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup v. Delo*, 513 U.S. at 324. This "new evidence" *must* "be sufficient to establish by clear and convincing evidence" that "no reasonable factfinder would have" sentenced him to death. 28 U.S.C. § 2244(b)(2)(B)(ii).

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1. To The Extent Petitioner's "Actual Innocence" Claim Relies On The Allegation That Bruce Samuelson Offered False Testimony, Petitioner Has Been Aware Of The Factual Predicate Of The Claim Since 1993

As previously demonstrated, petitioner has been aware of the factual predicate of any claim arising out of Bruce Samuelson's allegedly false testimony since no later than 1993. In fact, petitioner has been arguing claims based on these same facts for thirteen years. (*See* SER at 40-67.) Accordingly, to the extent that petitioner's claim relies on Samuelson's alleged false testimony, not only was

this factual predicate discoverable, it was discovered and presented to the district court in support of other claims (*see* SER at 40-67). *See Babbit v. Calderon*, 177 F.3d 744, 747 (9th Cir. 1999) (rejecting application to file successive petition where "[m]ost of the alleged facts Babbit alleges about counsel's alleged race bias have been known to him since the conclusion of his trial. . . . These facts, in and of themselves, provided sufficient factual predicates to trigger Babbit's obligation to raise a racially biased counsel claim in his previously filed federal habeas petition."). As such, petitioner's application fails to meet the requirements of § 2254(b) for filing a successive petition.

2. To The Extent That Petitioner's "Actual Innocence" Claim Relies On His Alleged Drug-Induced State, He Has Been Aware Of The Factual Predicate Of The Claim Since The Time Of The Murder

To the extent that petitioner's claim relies on his assertion that he committed the murder in a disassociated drug-induced state, petitioner has been aware of the factual predicate of the claim since the time of the murder. Moreover, current counsel has been aware of the factual predicate of this claim since the time of the filing of the first federal petition, when petitioner raised an ineffective assistance of counsel claim based on his alleged drug-induced state. (*See* SER at 68-79.) Since this proffered claim is based on the same facts,

petitioner cannot meet the requirements of § 2244(b) for filing a successive petition.

c. Petitioner Cannot Show That, In Light Of This Allegedly "New" Evidence, No Reasonable Fact Finder Would Have Found That Petitioner Murdered Terri Winchell By Lying-In-Wait

As previously demonstrated, none of petitioner's allegations amount to new evidence. Nevertheless, for the same reasons discussed above, petitioner cannot show that, in light of these supposedly new facts, no reasonable factfinder would have found that he murdered Terri Winchell by lying-in-wait. Indeed, as fully set forth above, quite apart from Bruce Samuelson's testimony, there was overwhelming evidence of petitioner's lying-in-wait. Moreover, petitioner's detailed account of the murder to Dr. Carson belies his assertion that he murdered Terri Winchell in a disassociated drug-induced state. In light of the petitioner's admissions to Dr. Carson alone, his proffered evidence fails to clearly or convincingly show that no reasonable factfinder would have found that he murdered Terri Winchell by lying-in-wait.

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CONCLUSION

Petitioner's application and request for stay of execution must be denied as he was aware of the factual predicate of his claims since either the time of trial or 1993. Moreover, Petitioner has failed to proffer any "clear and convincing" evidence to support his factual allegations. Finally, Petitioner has not and cannot demonstrate that no reasonable factfinder would have found that petitioner murdered Terri Winchell by lying-in-wait if presented with evidence of these allegedly new facts.

Dated: February 17, 2006

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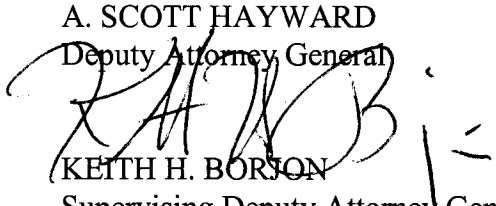

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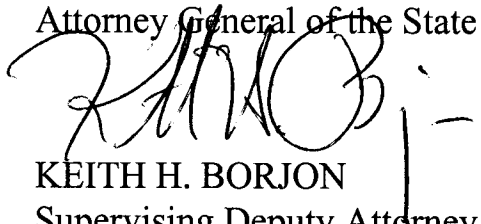

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